STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. PEN-15-555

DAY'S AUTO BODY, INC.

Plaintiff/Appellant

v.

TOWN OF MEDWAY
and
EMERY LEE AND SONS, INC.

Defendants/Appellees

On Appeal from a Judgment of the Superior Court, Penobscot County

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case arises out of a fire that completely destroyed the Plaintiff's business location. Plaintiff's complaint alleges that the Town of Medway negligently used vehicles, machinery and other equipment in fighting the fire, thereby failing to extinguish the fire in time to prevent catastrophic losses. Plaintiff's complaint further alleges that the Town of Medway engaged Defendant Emery Lee and Sons, Inc. to use an excavator at the fire scene which Emery Lee and Sons operated negligently, causing further damage. The Superior Court granted summary judgment for both the Town and Emery Lee and Sons, finding that they were entitled to immunity under the Maine Tort Claims Act. This timely appeal followed.

ISSUES PRESENTED FOR REVIEW

I. **WHETHER THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEFENDANT TOWN OF MEDWAY.**

A. WHETHER THE SUPERIOR COURT ERRED IN HOLDING THAT THE TOWN'S CONDUCT DID NOT FALL WITHIN THE EXCEPTION TO IMMUNITY FOR NEGLIGENCE IN THE OWNERSHIP, MAINTENANCE OR USE OF VEHICLES, MACHINERY AND EQUIPMENT.

B. WHETHER THE SUPERIOR COURT ERRED IN HOLDING THAT FIGHTING A FIRE WAS A DISCRETIONARY ACT FOR WHICH THE TOWN OF MEDWAY WAS IMMUNE.

II. **WHETHER THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEFENDANT EMERY LEE AND SONS, INC.**

A. WHETHER THE SUPERIOR COURT ERRED IN FINDING AS A MATTER OF LAW THAT EMERY LEE AND SONS, INC. WAS ACTING AS AN EMPLOYEE OF THE TOWN OF MEDWAY RATHER THAN AN INDEPENDENT CONTRACTOR IN USING AN EXCAVATOR DURING THE FIREFIGHTING EFFORT.

B. WHETHER THE SUPERIOR COURT ERRED IN DETERMINING THAT OPERATING AN EXCAVATOR AT A FIRE SCENE IS A DISCRETIONARY FUNCTION TO WHICH IMMUNITY WOULD APPLY.

C. WHETHER THE SUPERIOR COURT ERRED IN DETERMINING THAT EMERY LEE AND SONS, INC. WAS ENTITLED TO SUMMARY JUDGMENT EVEN THOUGH IT HAD FAILED TO DEMONSTRATE THE ABSENCE OF INSURANCE COVERAGE.

SUMMARY OF ARGUMENTS

It was error for the Superior Court to grant summary judgment to the Defendants in this case. This Court "review[s] a ruling on a motion for summary judgment de novo, viewing the evidence in the light most favorable to the non-moving party, to decide whether the parties' statements of material fact and referenced record evidence reveal a genuine issue of material fact." Pinkham v. Rite Aid of Maine, Inc., 2006 ME 9, ¶ 6, 889 A.2d 1009, 1010 (citation omitted). "A material fact is one having the potential to affect the outcome of the suit." Id. (citation omitted). "A genuine issue exists when sufficient evidence supports a factual contest to require a factfinder to choose between competing versions of the truth at trial. Id. (citation omitted).

Here, the Superior Court's decisions granting summary judgment to both defendants were in error. The Town of Medway was not entitled to summary judgment because there is a genuine issue of material fact as to whether the Town was negligent in its ownership, maintenance or use of vehicles, machinery or equipment in fighting the fire. Fighting a fire is a ministerial act, not a discretionary function, because it does not involve any policymaking decisions. Emery Lee and Sons, Inc. was not entitled to summary judgment because there is a genuine issue of material fact as to whether it was acting as an employee or an independent contractor, and whether using an excavator at a fire scene is a discretionary function to which immunity would apply. Summary judgment was also improper as to Emery Lee and Sons, Inc. because it failed to prove the absence of liability insurance coverage.

LEGAL ARGUMENTS

I.. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEFENDANT TOWN OF MEDWAY.

A. THE SUPERIOR COURT ERRED IN HOLDING THAT THE TOWN'S CONDUCT DID NOT FALL WITHIN THE EXCEPTION TO IMMUNITY FOR NEGLIGENCE IN THE OWNERSHIP, MAINTENANCE OR USE OF VEHICLES, MACHINERY AND EQUIPMENT.

The Maine Tort Claims Act ("MTCA") provides, in relevant part:

Except as specified in section 8104-B, a governmental entity is liable for property damage, bodily injury or death in the following instances.

1. OWNERSHIP; MAINTENANCE OR USE OF VEHICLES, MACHINERY AND EQUIPMENT. A governmental entity is liable for its negligent acts or omissions in its ownership, maintenance or use of any:

A. Motor vehicle, as defined in Title 29-A, section 101, subsection 42;

B. Special mobile equipment, as defined in Title 29-A, section 101, subsection 70;[1]

C. Trailers, as defined in Title 29-A, section 101, subsection 86;

D. Aircraft, as defined in Title 6, section 3, subsection 5;

E. Watercraft, as defined in Title 12, section 1872, subsection 14;

F. Snowmobiles, as defined in Title 12, section 13001, subsection 25; and

G. Other machinery or equipment, whether mobile or stationary.

...

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[1]"'Special mobile equipment' means a motor vehicle with permanently mounted equipment not designed or used primarily for the transportation of persons or property. 'Special mobile equipment' includes, but is not limited to, road construction or maintenance machinery, ditch-digging apparatus, stone crushers, air compressors, power shovels, cranes, graders, rollers, trucks used only to plow snow and for other duties pertaining to winter maintenance, including sanding and salting, well drillers and wood-sawing equipment or similar types of equipment." 29-A M.R.S.A. § 101(70).

14 M.R.S.A. § 8104-A. The Superior Court focused on subsection G in holding that fire fighting equipment such as fire trucks, pump trucks, hoses, hydrants and holding tanks[2] are not vehicles, machinery or equipment; however, Plaintiff did not solely rely on the catch-all provision in subsection G, but also relied on the fact that a fire truck and an excavator are "motor vehicles" under subsection A and the fire truck and the excavator are both "special mobile equipment" under subsection B. A hose is not (normally) used without being attached to a pump truck. Hydrants and holding tanks are not used without a truck to transport the water. A fire truck, with all of its associated equipment, meets the definitions of subsections (A), (B) and (G). Unlike a dumpster or bridge leaf equipment, as in the cases cited by the Town below, they are also capable of transportation, mobile, and likely to come into contact with the general public, they constitute fairly ordinary transportation devices with which people have a degree of familiarity, insurance is readily available for them, and they are not affixed to a permanent structure.

The original complaint focused on the negligent use of water hoses at ¶¶ 6(a), 6(b), 6(c), and 6(g) and the negligent use of the fire truck itself at ¶¶ 6(d), 6(e), and 6(f). This is not, as the Superior Court held, merely a question of how fire hoses and ancillary equipment were used. The fire trucks themselves were refilled only from a single hydrant a mile from the fire (causing wait time for other trucks), although there were two equally available fire hydrants just a quarter mile further away. The fire trucks were never refilled from the Penobscot River, which was only 200' from the scene of the fire, and fire truck operators continued to drive the fire trucks forward

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[2]Plaintiff's amended complaint specified that it sought to hold the Town vicariously liable for Defendant Emery Lee and Sons, Inc's use of the excavator. It seems apparent that an excavator would also meet the definition of vehicles, machinery or equipment within the meaning of Section 8104-A.

towards the holding tank, although any competent fire truck operator would have backed the fire truck in towards the holding tank to expedite water transfer. More fundamentally, a fire hose cannot be meaningfully distinguished from the fire truck to which it is attached. The statute expressly establishes liability for negligent acts or omissions in the maintenance or use of a wide variety of mobile vehicles or equipment. Negligence can arise from the use of mobile vehicles in a stationary position. If a Town official parked his car on a city street and opened his car door without checking first to see whether the way was clear, causing a collision with a bicyclist traveling in the far right-hand portion of the travel lane, the negligent use of this motor vehicle, albeit only a door, would be actionable under the MTCA. The door reached the locus of the accident because it was affixed to a vehicle.

The Superior Court reasoned that Plaintiff did not really complain about the fire trucks or the equipment itself, but about how the Town chose to use that equipment. Obviously, the fire fighting equipment (like most vehicles, machinery and equipment) does not work in the absence of an operator; however, the negligence of a Town employee in operating that equipment falls squarely within the exception in Section 8104-A. That conclusion is readily apparent from the plain language of the statute, which provides for governmental liability not only for negligent acts, but also negligent omissions in the ownership, maintenance or use of vehicles, machinery or equipment. Thus, if a fire fighter stood by and watched a fire burn while a fully operable pump truck sat dormant, that would also fall within the exception to immunity of Section 8104-A. When a police officer crashes her police cruiser into another vehicle, it is the conduct of the officer in using the vehicle, not the vehicle itself, of which the victim would complain. To accept Defendant's argument would completely eviscerate the intended purpose of the statute, which is

to hold the government liable for the negligent use of vehicles, machinery and equipment by its employees.

The decision of this Court in New Orleans Tanker Corp. v. Dept. of Transportation, 1999 ME 67, 728 A.2d 673, provides no real support for the Town. There, five members of this Court found that stationary bridge leaf machinery that raised or lowered a drawbridge did not fit within the "other machinery" catch-all of the statute. Here, Plaintiff is not relying solely upon the catch-all provision of 14 M.R.S.A. § 8104-A(1)(G) but the express provisions of Sections 8104-A(1)(A) and (B). Clearly, a fire truck is a motor vehicle as defined in Title 29-A, section 101, subsection 42, which provides in its entirety:

> Motor vehicle. "Motor vehicle" means a self-propelled vehicle not operated exclusively on railroad tracks, but does not include:
>
> A. A snowmobile as defined in Title 12, section 13001;
>
> B. An all-terrain vehicle as defined in Title 12, section 13001, unless the all-terrain vehicle is permitted in accordance with section 501, subsection 8 or is operated on a way and section 2080 applies; and
>
> C. A motorized wheelchair or an electric personal assistive mobility device.

As the Town cannot claim that a fire truck is not a self-propelled vehicle, it gains nothing from the case law dealing with stationary devices such as bridge leaf machinery. The Court in New Orleans Tanker Corp. emphasized that "[t]he risk from the negligent use of the bridge leaf machinery is not comparable to the risks from the items listed in Section 8104-A(1)(A) through (F). The major risk from the negligent use of vehicles with the power to move is that they will be driven or transported in locations where the general public is exposed to the possibility of a

collision and resulting harm." 1999 ME 67 at ¶ 9, 728 A.2d at 676. (emphasis added). While the risk of collision is the major risk of motor vehicles, it is not the only risk. Here, a fire truck, wherever it is driven, can, if not properly used, create risks of a controllable fire becoming uncontrollable.

The Superior Court relied upon this Court's decision in Thompson v. Department of Inland Fisheries & Wildlife, 2002 ME 78, 796 A.2d 674, for its conclusion that cases of negligence in the use of a vehicle do not fall within the exception to immunity found at 14 M.R.S.A. § 8104-A(1). First, the Court in Thompson repeatedly focused on the language in Section 8104-A(1) which carves out an exception to immunity only for negligence in the "ownership, maintenance or use" of any motor vehicle. It ultimately held that "[n]egligence in the execution of a rescue does not fall within the MTCA's exception to immunity for negligence in the ownership, maintenance or use of the State's vehicles." 2002 ME 78, ¶ 9, 796 A.2d at 677. The plaintiff in Thompson framed the issue not on how vehicles were used, owned, or maintained, but on how those vehicles were equipped. The plaintiff claimed that better equipment should have been placed on both a helicopter and road vehicles and that the helicopter should have had more gasoline. 2002 ME 78, ¶ 2, 796 A.2d at 675. Once these vehicles were put into use, there was no allegation that they were used negligently. Nor was there an allegation that they were maintained negligently. Finally, there were no allegations of negligence in the ownership of the vehicles.[3]

Here, by contrast, the vehicles were properly equipped and arrived at the scene of the fire

[3]Presumably, an allegation in negligence in ownership would be focused upon the owner of the vehicle entrusting the vehicle to an individual unqualified to drive it who was not an employee of that public entity.

in a condition such that the fire would have been more rapidly extinguished if the fire trucks and the equipment that was an integral part of the fire trucks were properly used. The fire trucks were driven to the wrong location to be refilled. The excavator used after the fire destroyed many salvageable items, converting a significant loss into a total loss, deprived Plaintiff of any ability to determine the origin of the fire, and ruptured a 260-gallon oil tank, releasing the entire contents of that tank onto the ground. (Amended Complaint, ¶¶ 10-12). The hoses attached to the fire truck were charged before the nozzles were opened, causing them to burst, were never placed on fog, to deprive the fire of oxygen, and were sprayed on a fireproof door, increasing the draft coming into the building and accelerating the fire. (Amended Complaint, ¶¶ 6(a) through 6(c)). These allegations regarding the negligent use of equipment attached to a vehicle are no different from allegations that a municipal official negligently opened the door of his parked car, causing an accident.

Defendant's argument would appear to be that the negligent use of a vehicle or attached equipment must be limited to a collision that occurs while a vehicle is in motion. That is not what this Court held in New Orleans Tanker Corp. v. Department of Transportation, 1999 ME 67, 728 A.2d 673. There, in deciding that bridge leaf machinery did not qualify as equipment, the Court emphasized that it was stationary and did not create a risk comparable to the risks that results from the negligent use of mobile machinery and equipment. 1999 ME 67, ¶ 6, 728 A.2d at 675. While the Court wrote that the major risk arising from the negligent use of a vehicle or attached equipment was a collision while the vehicle was in motion, it never identified this as the sole covered risk. A fire truck is driven to the scene of a fire and, if not properly used, creates the risk of a controllable fire becoming uncontrollable.

The fire truck and the excavator also fit within the definition of special mobile equipment and it is noteworthy to consider the types of equipment itemized in footnote 1 above: ditch-digging apparatus, a stone crusher, an air compressor, a power shovel, a crane, a grader, a roller, and a truck used only to plow snow. Risk from this type of equipment arises not simply from collision, but from the negligent use of the equipment. If the Legislature intended to exempt fire trucks generally from the express exception to sovereign immunity for mobile equipment and motor vehicles, it could have done so quite clearly and precisely. The Legislative silence is telling.

In Reid v. Town of Mt. Vernon, 2007 ME 125, ¶ 25, 932 A.2d 539, 546, this Court was again dealing with the catch-all provision of Section 8104-A, "other machinery or equipment, whether mobile or stationary." The Court emphasized that the risk from the negligent operation of a trash dumpster was not comparable to the risk arising from the negligent operation of specifically listed equipment found at Section 8104-A(1)(A) through (F). The risk for those expressly enumerated types of machinery are that they could be driven to locations where the general public is exposed to the negligent use of the motor vehicle or equipment.

Assume the Town had failed to properly maintain a vehicle with a leaking gas line and that the vehicle was parked in a citizen's driveway. If, because of the leaking gas line and a hot engine, the vehicle caught fire and the fire spread to an adjacent building owned by the citizen, the Town could hardly claim that its negligent failure to properly maintain the vehicle's gas line was not actionable under the MTCA. This would be true even though the damage came from a vehicle that was stationary and even though no collision resulted. The vehicle would have brought the fire danger to the citizen's home. Here, the negligent failure to properly use these fire

trucks and attached equipment in suppressing the fire turned a controllable fire into an all-out conflagration.

B. THE SUPERIOR COURT ERRED IN HOLDING THAT FIGHTING A FIRE WAS A DISCRETIONARY ACT FOR WHICH THE TOWN OF MEDWAY WAS IMMUNE.

The Superior Court held that even if fire trucks and equipment are vehicles, machinery or equipment, the Town was nonetheless immune because decisions about how to fight a fire are discretionary functions. That was error. Plaintiff did not complain about any policymaking decisions of the Town of Medway, but rather complained of the operational decisions of the Town's fire department in fighting the fire.

In Norton v. Hall, 2003 ME 118, ¶ 9, 834 A.2d 928, 931, a bare majority of this Court found that one could not separate the decision by a police officer as to whether to respond to a perceived emergency from the decision as to how to respond. These two events, deciding to rapidly respond and colliding with a vehicle at the high speeds involved as part of that response, occur within a very short period of time, and the decision to rapidly respond is an integral part of that rapid response itself. Here, the decision of whether to fight a fire is distinct from how one fights the fire. The firefighting took place over a lengthy period of time. Many ministerial, or operational, choices were available.

Operational decisions not involving the weighing of competing public policy concerns are not within the scope of discretionary function immunity. See Jorgensen v. Dept. of Transportation, 2009 ME 42, 969 A.2d 912; Tolliver v. Dept. of Transportation, 2008 ME 83, 948 A.2d 1223. In Tolliver, the negligence alleged was the failure of the Department of Transportation to provide line striping on a road during a road construction project. The court

noted that the discretionary function immunity of the MTCA is "intended to provide absolute immunity for acts that are uniquely governmental." 2008 ME 83, ¶ 17. That immunity serves the purpose of "protect[ing] the separation of powers on important policy questions." Id. at ¶ 18. Discretionary function immunity is applicable "where the alleged negligent acts involved discretionary decisions that were integral to the accomplishment of a uniquely governmental policy or program," but is not available for "ministerial acts...carried out by employees, by the order of others or of the law, with little personal discretion as to the circumstances in which the act is done." Id. at ¶¶ 20-21.

> In other words, "in cases where the questioned conduct has little or no purely governmental content but instead resembles decisions or activities carried on by people generally, there is an objective standard for judgment by the courts and the doctrine of discretionary immunity does not bar the action." Rodriguez [v. Town of Moose River], 2007 ME 68, ¶ 22, 922 A.2d [484] at 490 (quotation marks and alterations omitted); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 1040 (5th ed. 1984) (distinguishing between planning-level decisions that are entitled to immunity and operational-level decisions that are not).

Tolliver, 2008 ME 83 at ¶ 21. The Court noted that the MDOT had the statutory "authority to decide where and what traffic control devices are necessary on state highways." Id. at ¶ 24. The Court held that the MDOT's "initial decisions regarding the need for traffic control devices on specific roads are discretionary in nature, and MDOT may be immune for such planning-level decisions. When, however, MDOT has determined that traffic control devices, such as white edge lines, are necessary for the public safety, the implementation of that decision on a day-to-day operational level is no longer discretionary, but rather is a ministerial act to be carried out by MDOT employees." Id. The MDOT employees were not "involved in the careful weighing of competing public policy considerations when determining when to complete the striping of the

road and whether to use temporary edge line markings"; rather, "they were acting as all employees - governmental or nongovernmental - would in assessing the logical and most efficient way to complete a road improvement project." Id. at ¶ 23.

Likewise, in Jorgensen, the alleged negligence was the MDOT's setting up of a construction zone such that the plaintiff's vehicle collided with a parked construction vehicle. The Court recited the four-factor test for analyzing the applicability of discretionary function immunity:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective? (2) Is the questioned act, omission or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

2009 ME 42 at ¶ 17 (citation omitted). The court noted that there was no dispute as to the first, second and fourth factors, and the only dispute was whether the MDOT's decisions in setting up the construction zone met the third factor of the test. The court concluded that those decisions were not entitled to discretionary function immunity, even though setting up a construction zone clearly involved many factors that had to be considered in order to safely control the flow of traffic. The court held that "we are not persuaded that in most cases, how signs or other implements are used; where they are placed; and how, and how many, flaggers are employed are the types of decisions informed by public policy considerations, for which the Department was intended to have immunity from liability." Id. at ¶ 19. "[T]hese decisions were made on the ground at the scene of the road repair, and involved merely the Department's assessment of 'the

logical and most efficient way to complete [the] road improvement project,' rather than the balancing of public policy considerations." Id. at ¶ 21 (quoting Tolliver, 2008 ME 83, ¶ 23).

In the present case, the same principles apply, and the decisions made on the scene of fighting the fire did not involve the balancing of public policy considerations, but rather the logical and most efficient way to fight the fire. There is no doubt that the Town had the authority and duty to fight the fire, that public safety is an important governmental objective, and that fighting fires is essential to the realization of that objective. However, as in Jorgensen, the third factor of the four-factor test is not met here - the decisions made at the scene of the fire do not require balancing of public policy considerations. There may be some firefighting decisions that do require such balancing, such as where there are multiple fires burning simultaneously and limited resources must be allocated among them. See, e.g., Harry Stoller and Co., Inc. v. City of Lowell, 587 N.E.2d 780 (Mass. 1992). As the Massachusetts court noted in Harry Stoller, the words "discretionary function" are somewhat misleading as a name of the concept, since nearly all conduct involves some degree of discretion, but the discretionary function exception is far narrower, "providing immunity only for discretionary conduct that involves policy making or planning." 587 N.E.2d at 783. The court held:

> There are aspects of firefighting that can have an obvious planning or policy basis. The number and location of fire stations, the amount of equipment to purchase, the size of the fire department, the number and location of hydrants, and the quantity of the water supply involve policy considerations, especially the allocation of financial resources. In certain situations, firefighting involves determinations of what property to attempt to save because the resources available to combat a conflagration are or seem to be insufficient to save all threatened property. In such cases, policy determinations might be involved, and application of the discretionary function exception would be required.
>
> The case before us is different. The negligent conduct that caused the fire to

> engulf all the plaintiff's buildings was not founded on planning or policy considerations. The question whether to put higher water pressure in the sprinkler systems involved no policy choice or planning decision. There was a dispute on the evidence whether it was negligent to fail to fight the fire through the buildings' sprinkler systems. The firefighters may have thought that they had a discretionary choice whether to pour water on the buildings through hoses or to put water inside the buildings through their sprinkler systems. They certainly had discretion in the sense that no statute, regulation, or established municipal practice required the firefighters to use the sprinklers (or, for that matter, to use hoses exclusively). But whatever discretion they had was not based on a policy or planning judgment.... Therefore, the discretionary function exception does not shield the city from liability.

Id. at 785. Accord Angnabooguk v. State of Alaska, 26 P.3d 447 (Alaska 2001) (holding that some, but not all, firefighting decisions are discretionary, and the distinction lies between planning decisions and operational decisions). See also Invest Cast, Inc. v. City of Blaine, 471 N.W.2d 368, 371 (Minn. App. 1991) ("the fire department's decision on how many firefighter personnel and trucks to send to a fire is a policy decision protected as a discretionary function. How the firefighter personnel actually fight the fire, however, is not within the discretionary function exception.").

In the present case, each of the alleged negligent acts were operational and did not involve policy or planning considerations: negligence in the use of hoses (and failure to use hoses on "fog" inside the building); negligence in the placement of water from the hoses on a fireproof door; negligence in refilling the fire trucks from a single hydrant despite the availability of two other hydrants and the proximity of the Penobscot River; negligence in positioning a fire truck towards a holding tank; and negligence in the use of an excavator. None of those alleged acts of negligence involve such policy considerations as what equipment to buy, how many fire personnel to send, or the allocation of financial resources. As such, the conduct of which the

Plaintiff complains was purely operational rather than decisions involving policy or planning. In the words of Tolliver, the negligent conduct was in assessing the most logical and efficient way to fight the fire, which does not fall within the discretionary function exception to immunity.

II. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT EMERY LEE AND SONS, INC.

A. THE SUPERIOR COURT ERRED IN DETERMINING THAT EMERY LEE AND SONS, INC. WAS ENTITLED TO IMMUNITY BECAUSE IT WAS ACTING AS AN EMPLOYEE OF THE TOWN, RATHER THAN AN INDEPENDENT CONTRACTOR.

Under the Maine Tort Claims Act, "employees" of governmental entities are immune for performing or failing to perform any discretionary function pursuant to 14 M.R.S.A. § 8111. However, the definition of "employee" expressly excludes "a person or other legal entity acting in the capacity of an independent contractor under contract to the governmental entity." 14 M.R.S.A. § 8102. Thus, the first prerequisite to statutory immunity is that the defendant must be an "employee" rather than an independent contractor. Here, the facts do not support the conclusion that Emery Lee was an "employee" of the Town of Medway as a matter of law.

On page 10 of the Superior Court's decision, it quotes the definition of "employee" from Section 8102(1) of the Maine Tort Claims Act, then states the following conclusion: "According to this broad definition, [Emery Lee and Sons, Inc.] would be an employee unless the company were deemed to be an independent contractor." That conclusion is erroneous as a matter of law because a corporation can never be an "employee" under the language of Section 8102(1). Section 8102(1) defines an "employee" as "a person acting on behalf of a governmental entity..., but the term 'employee' does not mean a person or other legal entity acting in the capacity of an independent contractor to the governmental entity." Under the plain language of Section 8102(1),

an "employee" can only be a "person," as distinguished from some "other legal entity." Here, Plaintiff has sued only the corporation, Emery Lee and Sons, Inc., not the person, Emery Lee. Thus, the Court's decision holding that the corporation is an "employee" is erroneous and should be vacated.

Even if this Court should find that a corporation may meet the definition of "employee" under the MTCA, there is still a genuine issue of material fact whether Emery Lee and Sons, Inc. acted as an employee or an independent contractor in operating the excavator at the scene of the fire. The 8-factor test, originally developed in Murray's Case, 130 Me. 181, 154 A. 352 (1931), has been applied to the determination of whether a person was an "employee" for purposes of the Maine Tort Claims Act. See, e.g., Campbell v. Washington County Tech. Coll., 1999 U.S. Dist. LEXIS 16842 (D.Me. Oct. 28, 1999), *aff'd* 219 F.3d 3 (1st Cir. 2000). The 8 factors look at the following:

1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;

2) independent nature of his business or his distinct calling;

3) his employment of assistants with the right to supervise their activities;

4) his obligation to furnish necessary tools, supplies, and materials;

5) his right to control the progress of the work except as to final results;

6) the time for which the workman is employed;

7) the method of payment, whether by time or by job;

8) whether the work is part of the regular business of the employer.

Id. at * 15. The most important factor is the right to control, although no one factor is decisive.

Id. (internal and external citations omitted).

Here, at least six of the eight factors weigh in favor of finding that Emery Lee and Sons, Inc. was an independent contractor. Emery Lee and Sons, Inc. is an independent business or distinct calling; it had the right to employ assistants, if it deemed it necessary, with the right to supervise their activities; Emery Lee and Sons, Inc. supplied the excavator; Emery Lee and Sons, Inc. had the right to control the progress of the excavator work; Emery Lee and Sons, Inc. was employed for only 4 hours; and operating an excavator is not part of the regular business of the Town of Medway fire department. The other two factors, which deal with payment, are relatively neutral here - although there apparently was no contract for a fixed price, Emery Lee and Sons, Inc. charged $250.00 per hour for 4 hours of work for a total of $1,000.00, which is far in excess of what a regular employee would have been paid for the same work. Indeed, the invoice attached to Emery Lee's affidavit indicates that the bill was issued on behalf of the corporation, Emery Lee & Sons, Inc., rather than the individual, Emery Lee. As a corporation cannot be an "employee," this factor too weighs in favor of finding the Emery Lee was acting in the capacity of an independent contractor.

On these facts, it was error for the Superior Court to hold that Emery Lee and Sons, Inc. was acting as an employee of the Town of Medway as a matter of law, and the summary judgment in favor of Emery Lee and Sons, Inc. should be vacated.

B. EVEN IF EMERY LEE HAD BEEN ACTING AS AN EMPLOYEE OF THE TOWN OF MEDWAY, OPERATING AN EXCAVATOR AT A FIRE SCENE IS NOT A DISCRETIONARY FUNCTION TO WHICH IMMUNITY WOULD APPLY.

Operational decisions not involving the weighing of competing public policy concerns are

not within the scope of discretionary function immunity. See Jorgensen v. Dept. of Transportation, 2009 ME 42, 969 A.2d 912; Tolliver v. Dept. of Transportation, 2008 ME 83, 948 A.2d 1223. Please refer to the discussion of these cases in Section I(B) above.

In the present case, the decisions made by Emery Lee on the scene of the fire as to how to operate an excavator did not involve the balancing of public policy considerations, but rather the logical and most efficient way to minimize the damage caused by the fire. There is no doubt that the Town had the authority and duty to fight the fire (and to engage Emery Lee and Sons, Inc. to assist with the fire suppression effort), that public safety is an important governmental objective, and that fighting fires is essential to the realization of that objective. However, as in Jorgensen, the third factor of the four-factor test is not met here - the decisions made at the scene of the fire do not require balancing of public policy considerations. Emery Lee of Emery Lee and Sons, Inc. arrived at the scene four hours after the fire began, and by the time he arrived, the fire had largely subsided and all that was arising from the fire scene at that time was what might have been either smoke or steam. Plaintiff's statement of additional material facts (PSAMF), ¶¶ 28-30 (at Appendix, A-53). When Mr. Lee arrived there were no flames whatsoever, although in using his excavator, Mr. Lee was disturbing parts of the fire and was actually creating flames which were no more than two to three feet high. PSAMF ¶ 32 (A-54). Approximately a half hour to 45 minutes after Emery Lee began working on the fire remains with his excavator, he struck and ruptured two oil tanks, one of which was approximately half full and the other of which had just been filled. PSAMF ¶ 33 (A-54). These oil tanks were within the building proper, north and east of the center point of the building. Id. From the moment Emery Lee struck these oil tanks, the released oil fed the fire creating flames that shot 60 feet high. PSAMF ¶ 34 (A-54). As a result of

the use of the excavator, the chance of determining the origin of the fire was forever lost. PSAMF ¶ 35 (A-54). Indeed, a state fire marshal, Stewart Jacobs, who arrived at the scene was quite angry, exclaiming that this was a "total mess," and that he had "never seen anything like this before," and complaining that the use of the excavator had destroyed any ability he had to determine the origin of the fire. PSAMF ¶ 36 (A-54). Emery Lee used the excavator for approximately three hours to pick up equipment in the building which had not been damaged, was not flammable, and still had a significant amount of paint, including milling machines, lathes, steel tables, and a pressure washer. PSAMF ¶ 37 (A-55). With the jaws of the excavator, Emery Lee picked up this equipment and placed all of it in a pile in the center of the still smouldering fire, destroying the pieces of equipment he had moved. PSAMF ¶ 38 (A-55). Among the machinery that Emery Lee moved into a central pile in the middle of the burning embers was a snowplow blade which was not even inside the building but was 15 to 18 feet away from the building and had not been damaged by fire. PSAMF ¶ 40 (A-55). The snowplow blade was deformed by the excavator jaws. Id. In moving some of this machinery, Emery Lee dug into the concrete floor with his excavator in order to dislodge the bolted equipment from the concrete floor of the garage. PSAMF ¶ 41 (A-55). Emery Lee removed an overhead crane above a pick-up truck which, when it fell, damaged the pick-up truck. PSAMF ¶ 49 (A-57). That overhead crane was mounted to a large carrying beam. Id. There was no reason to remove the carrying beam and, in removing the carrying beam, Emery Lee damaged the overhead crane. Id.

Emery Lee's conduct at the scene of the fire was purely operational, rather than making decisions involving policy or planning. The negligent conduct was in assessing the most logical and efficient way to assist with the fire suppression efforts, which does not fall within the

discretionary function exception to immunity.

C. THE SUPERIOR COURT ERRED IN DETERMINING THAT EMERY LEE AND SONS, INC. WAS ENTITLED TO SUMMARY JUDGMENT EVEN THOUGHT IT FAILED TO DEMONSTRATE THE ABSENCE OF LIABILITY INSURANCE COVERAGE.

Defendant Emery Lee and Sons, Inc.'s motion for summary judgment (unlike the Town of Medway's motion for summary judgment, which expressly disavowed the existence of liability coverage) never mentioned the existence or non-existence of insurance coverage for Plaintiff's claims. Because governmental immunity is an affirmative defense, the entity bears the burden of establishing that it had no insurance coverage for the plaintiff's claims. See, e.g., Napier v. Town of Windham, 187 F.3d 177 (1st Cir. 1999); Berard v. McKinnis, 699 A.2d 1148 (Me. 1997).

Section 8112(9) provides as follows:

> **9. Certain suits arising out of use of motor vehicles.** A governmental entity is not required to assume the defense of or to indemnify an employee of that governmental entity who uses a privately owned vehicle, while acting in the course and scope of employment, to the extent that applicable liability insurance coverage exists other than that of the governmental entity. In such cases, the employee of the governmental entity and the owner of the privately owned vehicle may be held liable for the negligent operation or use of the vehicle but only to the extent of any applicable liability insurance, which constitutes the primary coverage of any liability of the employee and owner and of the governmental entity. To the extent that liability insurance other than that of the governmental entity does not provide coverage up to the limit contained in section 8015, the governmental entity remains responsible for any liability up to that limit.

(emphasis added). Thus, notwithstanding the immunity provisions of the Tort Claims Act, Section 8112(9) allows for recovery for negligence by a governmental employee in the use of a private motor vehicle to the extent of applicable liability insurance coverage. As defined under Section 8104-A, a "motor vehicle" means "a self-propelled vehicle not operated exclusively on

railroad tracks," except for a snowmobile, an ATV, a motorized wheelchair or an electric personal assistive mobility device. 29-A M.R.S.A. § 101(42).[4] An excavator is, therefore, a "motor vehicle" within that definition.

Emery Lee and Sons, Inc. has not proven, nor even attempted to prove, that it lacked any liability insurance coverage for its negligence in the use or operation of the excavator. As such, even if Defendant Emery Lee and Sons, Inc. was correctly found by the Superior Court to have been acting as an "employee" of the Town of Medway in using that excavator, it may still be held liable to the extent of any liability insurance coverage under Section 8112(9). Because Emery Lee and Sons, Inc. has failed to prove the lack of any such liability insurance coverage, it was not entitled to summary judgment as a matter of law.

In fact, Acadia Insurance insures Emery Lee & Sons, Inc., for the fire loss on October 3, 2011 and, prior to the commencement of this litigation, wrote to counsel for Day's Auto Body to confirm such representation. Thus, it was incumbent upon Emery Lee and Sons, Inc. to demonstrate that the insurance coverage provided by Acadia mirrored the limiting language of the Maine Tort Claims Act. Otherwise, Emery Lee and Sons, Inc. can only avail itself of its claimed immunity to the extent the claim exceeds its applicable policy limits for the negligent operation of a motor vehicle.

Defendant argued, in its opposition to Plaintiff's motion for reconsideration of the Superior Court's order granting summary judgment, that an exclusion in the policy negates the

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[4]Defendant argued that an excavator is not a "motor vehicle" within the meaning of Section 8112(9), citing definitions of "motor vehicle" from the Maine Motor Vehicle Dealers Act and case law interpreting the phrase "other machinery or equipment." Those definitions are irrelevant, since "motor vehicle" is expressly defined within the MTCA, Section 8104-A, to be the definition set forth in Title 29-A, section 101, subsection 42.

existence of coverage; however, Defendant never made the policy part of the summary judgment record and never made that argument until its response to the motion for reconsideration; thus, it has waived that argument on appeal. Furthermore, the insurance policy has never been produced to Plaintiff and Plaintiff has had no opportunity to review the language of that exclusion in light of the other provisions of the policy. Under Maine law, insurers bear the burden of proving the applicability of policy exclusions, and any ambiguity as to the meaning of policy language is construed against the insurer. Am. Guar. & Liab. Ins. Co. v. Timothy S. Keiter, P.A., 360 F.3d 13, 17 (1st Cir. 2004). Exclusions are disfavored and are construed strictly against the insurer. Kinney v. Maine Mut. Group Ins. Co., 2005 ME 70, ¶ 18, 874 A.2d 880, 885. A provision in an insurance contract is ambiguous if it is reasonably susceptible of different interpretations. Id.

Had Emery Lee and Sons, Inc. wished to negate the existence of a genuine issue of material fact as to insurance coverage, it should have done so in its motion for summary judgment, to which Plaintiff had the opportunity to respond, not in response to a motion for reconsideration when Plaintiff has no such opportunity. Its failure to do so renders the grant of summary judgment inappropriate as a matter of law, since Defendant did not meet its burden of showing that immunity is not waived under Section 8112(9) of the Tort Claims Act due to the existence of liability insurance coverage.

For the foregoing reasons, Emery Lee and Sons, Inc. has not proven that it was entitled to summary judgment in its favor on Plaintiff's claims as a matter of law. There are genuine issues of material fact as to whether Defendant was acting as an employee or an independent contractor, and whether there existed liability insurance coverage such that immunity was waived under Section 8112(9). As such, this Court should vacate the entry of summary judgment in favor of

Defendant Emery Lee and Sons, Inc. and remand this case to the Superior Court for further proceedings.

CONCLUSION

For the foregoing reasons, the Superior Court erred in granting summary judgment to both the Town of Medway and Emery Lee and Sons, Inc. in this case. The summary judgments should be vacated in their entirety and this case should be remanded to the Superior Court for trial.

Dated at Bangor, Maine this 31st day of December, 2015.

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CERTIFICATE OF SERVICE

I, Julie D. Farr, Esq., Attorney for Appellant, hereby certify I have made due service of the within Brief of Appellant and Appendix by mailing two conformed copies of the Brief and one conformed copy of the Appendix by regular course of the United States mail, postage prepaid, to counsel for Appellees at the following addresses:

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